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In the Supreme Court of the United States

October Term, 1973

NO. 73-731

FRANCIS SNIDER, et al.,

Petitioners,

vs.

ALL STATE ADMINISTRATORS, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 302(e) of the National Labor Relations Act, as amended, 29 U.S.C. Section 151, *et seq.*, hereinafter referred to as the "Act", is limited to restraining future violations of the Statute and does not include granting relief by way of accounting, receivership, removal of trustees or administrators for alleged improper acts or omissions, or nullifying a contract between the trustees and the administrators of trust funds.

STATEMENT OF THE CASE

While contract negotiations were underway between Local 15 and a number of bricklaying, masonry, and plastering contractors in the central Florida area, Respondents, GEORGE C. STUART, president of the Plasterers Contractors Association, DON GOAD, business manager of Local 15, and DAVID W. FOLEY, a licensed insurance broker, organized several corporations for the purpose of administering union health and welfare trust funds. The six corporations organized by the Respondents were: All State Administrators, Inc., All State Administrators, Inc. of Orlando, All State Administrators, Inc. of Jacksonville, All State Administrators, Inc. of Miami, All State Administrators, Inc. of Tallahassee and All State Administrators, Inc. of Tampa. The beneficial ownership of the stock in each of the All State corporations was divided among Respondents, STUART, FOLEY, and BILLIE JEAN RHAN, Don Goad's stepdaughter. A seventh corporation, Orange Services, Inc., was organized with the plan that it would eventually serve as a holding company for the other six. The stock of Orange Services, Inc. was held by STUART, RHAN, and JOHN M.

TATE, another insurance broker. These corporations were organized in anticipation that negotiations then underway would result in the establishment of trust funds for which the Respondents, GOAD and STUART, through their respective positions with the union and employers, could control the selection of an administrator.

As a result of the negotiations, Local 15 and the employers' associations entered into two Collective Bargaining Agreement(s), one covering plasterers and the other bricklayers and cement masons, which provided that the employers would pay certain amounts per hour worked by union employees into a Health and Welfare Fund to be established in accordance with Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. Sec. 186. Both Collective Bargaining Agreement(s) were signed by Respondent, DON GOAD, as Business Agent of Local 15. The plasterers' contract was signed on behalf of the employers by Respondent, GEORGE C. STUART, as president of the Plasterers Association, Inc., Orange, Osceola, Lake, and Seminole Counties.

Prior to the effective date of the Collective Bargaining Agreement, Local 15 elected GOAD, and another union member, C. L. DICKSON, as the two trustees to represent the union. STUART selected C. L. McCULLOUGH and W. S. PYNE, both former employees of Stuart's plastering company, as trustee nominees of the employers.

The Petitioners charged that the employers' trustees were handpicked by STUART. The correctness of this contention may be accepted, but by way of explanation, Respondents say that they experienced

difficulty in finding persons willing to serve as trustees because it was a completely thankless job. Naturally trustees representing the employers would not have as keen a personal interest in the administration of the trust as would the trustees of the recipients of the benefits of the fund. It is true that STUART did select those who were closely associated with him. PYNE at the time was working for a contractor who occupied premises at 1 Drennen Drive, the location of the Stuart Plastering business, and McCULLOUGH was an employee of the STUART PLASTERING COMPANY. Before PYNE was asked to serve as a trustee, STUART obtained approval from PYNE's employer concerning the appointment. Even if all formalities had not been complied with, the acts of the employers' representatives were ratified by the employers, who were the only ones responsible for their selection. Such ratification of the selection occurred by the continuing contributions of the employers to the Trust Fund.

Pursuant to the authority conferred upon them under the Trust Agreement, the four trustees selected All State Administrators, Inc. of Orlando as the administrator of the Trust Fund. After All State of Orlando took over administration of the Fund, all monies contributed by employers were deposited in the name of the administrator and expenses of both the Trust and the administrator were paid out of the common fund. Among other expenditures, the administrator paid out of the trust funds the costs and fees, including attorney's fees incident to the incorporation of itself, of the remaining five All State corporations and of Orange Services, Inc. The administrator also used

trust funds to pay premiums on life insurance for its officers, STUART and FOLEY, as well as travel and entertainment expenses unconnected with the purposes of the Trust. Trust funds were likewise used to pay entertainment expenses incident to GOAD's unsuccessful campaign for re-election as Business Manager of Local 15. In addition to these expenditures, which the District Court characterized as an improper diversion of trust funds, All State of Orlando executed a lease with its president, GEORGE C. STUART, for office space in the building occupied by the Stuart Plastering Company and paid the rent under this lease out of the Trust Fund.

Simultaneous with the selection of All State of Orlando as the administrator of the Trust, the trustees signed an Agreement with Aetna Life & Casualty Company to underwrite the Health and Welfare Fund. This policy was placed through Aetna agent, JOHN M. TATE, a stockholder in Orange Services, Inc. TATE agreed to rebate seventy percent (70%) of his commission from Aetna to Respondent FOLEY, stockholder, secretary and a moving party in the organization of the All State corporate family.

The Respondents justified these expenditures on the theory they had a right to use the funds, and even if they did not have such right, All State would receive fees for its services as administrator, out of which could be returned the improperly diverted funds of the Trust. Quite naturally this brought about dissension and discontent among some members of the union, including the Petitioners.

At trial in the District Court, the Respondents offered to pay back all funds which had been improperly

expended, without admitting that there had been any intentional wrongdoing on their part with respect to such expenditures.

As a result of the union members' discontent with the management of their Trust Fund, GOAD and DICKSON were removed as union trustees and replaced by FRANCIS SNIDER and GUY ASHCRAFT. Following an audit of the Trust Fund, SNIDER and ASHCRAFT initiated the action on behalf of themselves and other members of Local 15. The Complaint prayed for immediate injunctive relief against the improper disbursement of trust funds, for nullication of the contract between the administrator and the trustees, an accounting, an appointment of a receiver and removal of the administrators.

The Respondents specifically take issue with that part of the Petitioners' "Statement of the Case" which attempts to present to this Court matters which are not part of the Record on Appeal. While they attempt to persuade this Court to grant certiorari by including such matters, they fail to point out the Respondents performed their duties, albeit with some mistakes, for a period of four (4) years and have never been paid any fee for their services due to the Petitioners' refusal to pay any fee whatsoever.

REASONS FOR DENYING THE WRIT

I

THE DECISION BELOW, BY THE WEIGHT OF REASON AND AUTHORITY AND BY THE PLAIN LANGUAGE OF THE STATUTE, IS CORRECT AND ADOPTS A DECISION OF THE SUPREME COURT OF THE UNITED STATES.

(References to the portions of the Judgments below are included in the Appendix to the Petitioners' Petition and will be referred to as "Pet.App.; page_____".)

There is no question as to the fact that the plain language of the Act limits the jurisdiction of the District Courts under Section 302(e) to restraining future violations of the Statute and does not include granting relief by way of accounting, receivership, removing trustees or administrators or voiding contracts with administrators. In *Arroyo v. United States*, 359 U.S. 419, 79 S.Ct. 864 (1959) the Supreme Court of the United States described the purposes and the jurisdictional scope of Section 302 as follows:

> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain . . . To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered prop-

> er and expended only for the purposes for which they were established . . . Continuing compliance with these standards in the administration of welfare funds were made explicitly enforceable in federal district courts by civil proceedings under Sec. 302(e). The legislative history is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection." 359 U.S. 419, 426-27, 79 S.Ct. 864, 868-69. 3 L.Ed. 2d 915 (1959)

The Court of Appeals for the Fifth Circuit in its opinion in this case pointed out that the laws of the respective states regulate trust funds for the benefit of union members. While Congress did enter the field to regulate the Congressionally created exemption of allowing an employer to make contributions to such funds to avoid abuse of the exemption, state authority remains the legal foundation upon which such funds are constructed. (Pet.App.; page 46)

Numerous decisions have examined the jurisdiction of the Federal Courts in cases of this nature. The decisions have generally held that under the *Welfare and Pension Plans Disclosure Act*, U.S.C.A. Section 301, the Statute is confined to a disclosure and reporting function and does not confer jurisdiction on the Federal Court to supervise or regulate internal administration on welfare and pension funds. The Courts have also considered jurisdiction under Title 29, *LMRA*, Section 302, and have held that the jurisdiction of the Courts under this Act does not extend to granting the relief prayed for in the Petitioners' Complaint.

Moyer vs. Kirkpatrick, 265 F. Supp. 348 (U.S.D.C. Penn. 1967) affirmed 387 F.2d 955 (3rd C.C.A. 1968) was an action by union members against the trustees of a health and welfare fund. The Complaint alleged that the trustees were acting improperly and in breach of their fiduciary duties by refusing to accept payments from certain employers, thereby denying the Plaintiffs benefits to which they would otherwise be entitled. The Defendants filed Motions to Dismiss the Complaint for lack of jurisdiction and for failure to state a claim under which relief can be granted. The Court held that the Motion to Dismiss must be granted on both grounds. The Third Circuit Court of Appeal affirmed on the basis of the lower court's opinion. The lower court, in discussing the matter of jurisdiction, held that Court review of business judgments of trustees and administrators of trust funds are not conferred by the *Disclosure Act*, nor may it be reasonably implied therefrom. The Statute is limited to a disclosure and reporting function. The Court also held that *LMRA* does not confer jurisdiction in the Federal Court to regulate the administration of such funds.

The case of *Bowers vs. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st C.C.A. 1968) involved alleged wrongful diversion and misappropriation of welfare and pension funds. The appeal resulted from a dismissal of the Plaintiff's Complaint. The lower court was affirmed on the grounds that the Federal Court lacked jurisdiction. The Court noted that the Statutes giving the Federal Courts jurisdiction permits injunctive relief only against future diversions of funds, which are also crimes, and does not afford even injunctive relief against violations of fiduciary obligations or stan-

dards of prudence in administration of the trust funds. The Court noted that the provisions of *LMRA*, Section 302(e), 29 U.S.C.A. Section 186(e) are not the "fundation stone" for Federal Court management of trust funds.

The case of *Employing Plasterers' Assoc. of Chicago vs. Journeymen Plasterers Protective and Benevolent Society of Chicago, Local No. 5*, 279 F.2d 92 (7th C.C.A. 1960) is one of the leading cases on point. This case involved an appeal from an order of the lower court dismissing the Complaint of the Plaintiffs. The Court summarized the Complaint of the Plaintiffs, at page 95, as follows:

> "The Complaint herein alleged that defendants are "representatives" of employees; that they are receiving contributions from employers for the purpose of providing employee welfare benefits; that the contributed funds are not administered in accordance with Section 302; and that said contributions are, therefore, in violation of Section 302 (a-g). In addition, there is alleged the unauthorized disbursement of said funds."
>
> "The Association demands that violations of Section 302 be enjoined by restraining defendants from demanding, coercing, and accepting employer contributions, and from making further disbursements of money now in possession of the Institute. The Association also asks for the appointment of a receiver in respect to said funds and for an accounting of receipts and disbursements of employer con-

tributions from date of the inception of the Institute."

The Court reversed the dismissal of the Complaint for lack of jurisdiction on the ground that the Federal Courts do have the limited jurisdiction to enjoin future misappropriation of trust funds, but that the jurisdiction extends no further. The Court also noted that an action does lie for the misuse of trust funds, but that such action properly lies in the *State* Courts, and that no jurisdiction is conferred on the Federal Courts to grant such relief. The Court noted, on page 97 of its opinion, as follows:

> "Employees have a primary, if not exclusive, right to bring an action for injunction, receivership, and accounting based on alleged misuse of funds held in trust for their benefit. Such an action may properly lie in the State Courts under established principles of equity. The Labor-Management Relations Act does not create jurisdiction in the Federal Court to entertain employees' claims based solely on the alleged diversion or conversion of their welfare funds."

> "Section 302 is aimed primarily at the prevention of possible abuse and not at providing a remedy for abuse actually perpetrated."

In the case of *Kroger Co. vs. Blassie*, 225 F.Supp. 300 (U.S.D.C. Mo. 1964) an action was brought for the determination of whether or not a welfare trust met the Federal Statutory requirements and seeking an injunction against future violations. The Court entered its Order enjoining certain future actions of the

trustees. However, with regard to the issue of jurisdiction beyond this limited future injunction, the Court noted, at page 312 of its Opinion, that the Plaintiffs challenged various acts of the trustees and sought to envoke the more general equity powers of the Court over welfare funds. The Court noted, at page 313, as follows:

> "It would seem to this court that the Supreme Court clearly indicates that while activities in the day to day administration of the trust may be subject to control by the courts, that it is the state courts, who from day to day deal with the administration of trust funds, in trusts of all kinds, description and character, who must deal with those activities in trusts of this type. It is this Court's opinion that 29 U.S.C.A. §186 is aimed primarily at the prevention of possible abuse and not at providing a remedy for abuse actually perpetrated in the operation of the trust. The Act grants jurisdiction to district courts to enjoin violation of 29 U.S.C.A. §186 A and B. Nothing is mentioned about giving federal courts jurisdiction over welfare trusts and trustees except where violations of the Act occur. If the conduct is legal under the Act, then this Court has no jurisdiction, but rather, jurisdiction is that of a state court."

In this case, the Plaintiffs also contended that the Defendants should be permanently enjoined from acting as trustees of the funds. The Court, in *Kroger, supra*, noted that it did not have authority to enter such an order, stating, at page 314, as follows:

"The reason is that, as previously stated, the court is of the opinion that the federal district courts do not have the jurisdiction to review the administration of a welfare trust except where violation of the Act occurs, because such matters are not violations from the Act, but fall within the activities of the day-to-day administrations of the trust. In view of this finding by the court, it would serve no useful purpose for this court to discuss matters pertaining to administration of the trust, for those are matters for a state court's consideration."

The case of *Holton vs. McFarland*, 215 F.Supp. 272 (U.S.D.C. Alaska, 1963) also supports the foregoing statements of law.

Accordingly, the Respondents respectfully submit the District Court properly ruled that it lacked jurisdiction over this action, except for the limited purposes of requiring the Defendants to make a complete disclosure and to enjoin any further misappropriation of funds from the trustees. The trial court found that this had been done and had fully accomplished the purpose. The relief sought by the Plaintiffs must be obtained in the State Courts and not in the Federal Courts.

The Respondents dispute the claim of the Petitioners that it is a Federal Statute which gives breath to a trust fund and prescribes the manner in which the fringe benefit program is to be created. Trust funds for the benefit of union members are established under the laws of respective states. The Act does not prescribe, but proscribes. It limits the way in which

employers can make contributions to such funds. Without the creation of trust funds under state law there would be no need for the enactment of the Act itself. Just because Congress recognized the fact that trust funds exist and saw a need to avoid an abuse of those funds does not mean that the Federal Courts now have jurisdiction over any problems which arise pertaining to trust funds. If Congress intended the Act to preempt the field in trust administration problems they would have done so when the Act was created. Congress went far enough to allow the District Courts to enter injunctions against any further improper expenditures from trust funds with knowledge that state laws provided for the manner in which the funds must be administered and penalties for failure to do so.

> "The legislative history (of Section 302(e)) is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection." *Arroyo, supra.*

In effect, the Petitioners are attempting to make a Federal case out of what is a state court case. The purpose of congressional action in passing the Act was to prevent potential abuse of the exemption allowing employers to contribute to trust funds by means of an injunction. Once an injunction is granted, as it was in this case, any further abuse is stopped and then the Petitioners can litigate any claims which arose prior to the injunction in the state courts under whose laws the funds were created without fear of any further wrongdoing by the alleged defalcators.

POINT II

ASSUMING ARGUENDO THAT THE COURT HAD JURISDICTION OVER MATTERS OTHER THAN REQUIRING AN ACCOUNTING AND ISSUING AN INJUNCTION, THE PETITIONERS FAILED TO PROVE THE ESSENTIAL ELEMENTS NECESSARY FOR THE RELIEF SOUGHT.

The trial court, after consideration of the evidence, made extensive findings of fact and law in this cause. (Pet.App.; page 10-30) The Court found from the evidence that the Trust Agreement met the legal requirements and that there was nothing in violation of the law or the agreement itself in the manner in which the trustees were selected. (Pet.App.; page 20-22) The Court also found that the contract between the Administrator and the trustees was executed in accordance with the testimony given by the Respondents and that the trustees had authority to execute the contract. (Pet.App.; page 21) The Court further ruled that the union did not have standing to object to the manner in which the trustees were selected and had, in fact, violated the Statute and the agreement themselves. (Pet.App.; pages 22 and 27)

The Court then examined each of the prayers for relief sought in the Complaint. First, the Court noted that an injunction was sought and that one had been granted and had served its purpose. (Pet.App.; page 23) Secondly, the Court was asked to nullify the contract between the administrator and the trustees. The Court specifically ruled that there was no basis in fact or law to grant such relief. (Pet. App.; page 24)

Thirdly, the Plaintiffs asked for the appointment of another administrator. Again, the Court specifically ruled that there was no showing of necessity for such an order based upon the facts, even if the Court had jurisdiction. (Pet.App.; page 25) Fourth, the Petitioners asked for an accounting and the Court correctly noted that a full accounting had been rendered and that, in fact, the books and records had always been available. (Pet.App.; pages 26 and 28) Fifth, the Petitioners sought the removal of all of the Defendants from any connection with the trust. The Court correctly noted that labor had already changed its trustees, that the Contract Administrator was not a party to the suit, and that there was no basis in fact for the trustees' removal. (Pet.App.; pages 26, 23 and 24) The Court noted that there was no evidence that the trustees had not conscientiously carried forward their duties since the entry of the restraining order. (Pet.App.; page 27) The Court further found that the Petitioners themselves had not complied with the Statute or the Trust Agreement and could not complain. (Pet.App.; page 27)

Thus, the trial court did consider each of the Petitioners' claims on the merits and found against them, both on the facts and the law, despite the fact that the Court also noted that it did not have jurisdiction to grant much of the relief sought. In Rule 52(a) of the Federal Rules of Civil Procedure, it is provided that findings of fact by the Court in actions tried without a jury ". . . will not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

Findings have been held not to be "clearly erroneous" unless (1) the findings are without substantial evidence to support them, (2) the Court misapprehended the effect of the evidence, or (3) even if there is substantial evidence, the evidence as a whole is so against the great preponderance of the evidence that it does not reflect the truth or right of the case. *Western Cottonoil Co. vs. Hodges*, 218 F.2d 158 (C.A. 5th 1954).

In the case at bar, Petitioners' brief is replete with conclusions, accusations and cliches, with little or no factual relation to the actual record in this cause.

It is respectfully submitted that the Petitioners have failed to demonstrate that the findings of fact by the trial court were clearly erroneous under the test set forth in *Western Cottonoil* and accordingly, the trial court should be affirmed, and the Petition for Certiorari denied.

CONCLUSION

The Petition for Certiorari should be denied on the grounds that:

1. The Court lacked jurisdiction to grant the relief requested except for the reporting and injunctive powers.

2. The Court did consider the relief sought by the Plaintiffs on the merits and found as a matter of law and based upon the facts of the case that the Plaintiffs were not entitled to the relief sought. There has been no showing that said findings of fact were clearly erroneous.

Respectfully submitted,

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CERTIORARI DENIED